DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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In reviewing the draft, you should be aware that there are several legal issues that are of concern. First, the draft specifies the "assumed rate". The assumed rate is used by the employe trust funds board for all calculations of required contributions and participant reserves under the fixed annuity division of the WRS. By imposing a new "assumed rate" that is different from the one the employe trust funds board has approved under s. 40.02 (7), the draft may affect the fiduciary responsibility of the employe trust funds board. Please note, however, that the employe trust funds board would still have the authority to change the new "assumed rate" for calendar year 2000 back to the prior "assumed rate". For this reason, it is uncertain if the specification of a new "assumed rate" would in practice affect the fiduciary responsibility of the employe trust funds board.

Second, this draft requires an accelerated distribution in the amount of $5 billion from the transaction amortization account (TAA). This is a considerable transfer of funds that is not currently provided for in law under ch. 40, which requires that only 20% of the balance of the TAA be distributed each year. While there is no case law on point dealing solely with the legality of an accelerated TAA transfer, there is relevant case law that prohibits the legislature from affecting "the actuarial soundness" of a retirement plan. *Ass'n of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 562 (1996). Hence, if the "actuarial soundness" of the WRS is in any way affected by this TAA accelerated transfer, a court could find the transfer illegal.

Third, please note that there are equity issues involved in this TAA transfer that could amount to a constitutional violation. Under current law, the accounts of all participants in the WRS are not treated the same. Participants who began covered employment before 1982 have their accounts in the fixed annuity division credited annually with essentially the actual interest rate, while participants who began covered employment after 1981 have their accounts in the fixed annuity division credited annually with a 5% interest rate. By providing for an accelerated distribution from the TAA, participants who began covered employment after 1981 will not have any of these transferred moneys credited directly to their accounts, while participants who began covered employment before 1982 will have these moneys flow to their accounts in the form of increased interest crediting. The problem is that had these moneys remained in the TAA, those participants who began covered employment after

1981 could have been eligible to potentially receive some of these moneys upon retirement. As annuitants under the WRS, they would be eligible to have TAA distributions actually credited to their accounts. But, because of this accelerated distribution, these moneys are no longer in the TAA.

If ch. 40 is viewed as a contract between the state and the participants, in which a participant may expect that 20% of the TAA will be distributed annually, then an accelerated distribution from the TAA that is greater than 20% and that results in some participants being unable to receive at the time of retirement moneys that they otherwise would have been eligible to receive may result in an impairment of contract. Such an impairment of contract could result in a taking of property without just compensation, in violation of article I, section 13, of the Wisconsin Constitution.

It is important to note, however, that there have been accelerated distributions from the TAA in the past and none of the distributions have been found by a court to be unconstitutional. In fact, even in *Retired Teachers Ass'n v. Employe Trust Funds Bd.*, 207 Wis. 2d 1 (1997), the supreme court did not hold that the TAA accelerated distribution in itself was unconstitutional, but instead found that the legislature's directing the use of the funds from the accelerated distribution to pay for the Special Investment Performance Dividend for certain WRS annuitants was unconstitutional. In other words, the court did not find the TAA transfer illegal; the court found illegal the use to which some of the funds were put after the transfer had occurred.

Because of the highly technical nature of this draft, I strongly recommend that you have DETF review the draft for technical and implementation consideration. Also, you may wish to speak with DETF about the treatment of increasing the retirement formula multiplier for past service. There are many ways to do this. In this draft, I have had the retirement formula multiplier apply to all service for current employes *credited* before January 1, 2000. This means that if a current employe wishes to receive the multiplier increase for any years of service that he or she may have cashed in in the past, the employe will have to purchase those years before January 1, 2000. As an alternative, you could specify that the multiplier increase will apply to all service for current employes *earned* before January 1, 2000. This will permit current employes to repurchase the prior service at any time and receive the formula increase.

Finally, please note that I have prepared this draft on the assumption that it will be enacted before December 31, 1999. If it becomes clear that the draft will not be enacted before that date, then I will need to prepare an amendment to address this issue.

If you have any questions at all about the draft, please call me.

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